

UNITED STATES  
v.  
EARL F. FOX

IBLA 80-620

Decided March 26, 1981

Appeal from decision of Administrative Law Judge R. M. Steiner, declaring lode mining claims invalid. CA-5176.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Mining Claims:  
Contests -- Mining Claims: Discovery: Generally

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case, the burden then shifts to the claimant to overcome that showing by a preponderance of the evidence.

2. Administrative Procedure: Burden of Proof -- Mining Claims:  
Discovery: Generally

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established.

3. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a prudent person would be justified in the further expenditure of his labor and means, with a reasonable

prospect of success in developing a valuable mine.

APPEARANCES: Earl F. Fox, pro se.

#### OPINION BY ADMINISTRATIVE JUDGE FRAZIER

This appeal is from a decision by Administrative Law Judge R. M. Steiner declaring the Cobra Copper No. 14 through No. 39 and No. 43 through No. 61 lode mining claims invalid. The claims are situated within the Death Valley National Monument. The lands within the Monument were withdrawn from mineral entry on September 28, 1976. 16 U.S.C. §§ 1901-1912 (1976).

On July 24, 1978, the Bureau of Land Management (BLM), on behalf of the National Park Service, issued a complaint charging that there were not presently disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.

A hearing on the contest was conducted on March 7, 1979, in Los Angeles, California, and on June 12, 1979, in Sacramento, California before Judge R. M. Steiner. His decision rendering the claims invalid was issued on April 8, 1980. Judge Steiner concluded therein that contestant had presented a prima facie case of no discovery, and that the contestees 1/ had not sustained their burden of proving a discovery of a valuable mineral deposit within the limits of the claim. The Judge's determination incorporates the following principles of the mining law:

[1] When the United States contests a mining claim, it has assumed only the burden of going forward with sufficient evidence to establish a prima facie case of no discovery; the burden then shifts to the contestee to refute, by a preponderance of the evidence, the Government's case. United States v. Hooker, 48 IBLA 22 (1980); Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); United States v. Springer, 491 F.2d 239 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

[2] The United States has established a prima facie case of the invalidity of a mining claim when a qualified Government mining engineer testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable mineral deposit. United States v. Taylor, 25 IBLA 21 (1976).

[3] The discovery of a valuable mineral deposit within the limits of a mining claim is the sine qua non for a valid location. 30 U.S.C.

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1/ August Pfaehler, who participated as a contestee below, has not joined in the appeal to this Board.

§§ 23, 35 (1970). A discovery exists "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Castle v. Womble, 19 L.D. 455 (1894); United States v. Coleman, 390 U.S. 599 (1868); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). This test, known as the "prudent man test" has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called "marketability test." United States v. Coleman, *supra*; Converse v. Udall, *supra*.

Appellant has made no showings on appeal to cast doubt upon either the Judge's evaluation of the evidence or his conclusions of law. Appellant alleges, however, that his constitutional rights were violated because the Government mineral examiner came to his house, examined documents relating to the claims, and discussed the claims with appellant. Appellant suggests that impropriety occurred because in the contest the mineral examiner was a chief witness for the contestant.

The record does not bear out these allegations of impropriety. It shows that appellant voluntarily discussed his claims with the examiner. The responsibilities of the mineral examiner are to examine claims and verify, if possible, the discovery alleged by the claimant. Thus, it is incumbent upon a mineral examiner to contact and communicate with a claimant, and if a discovery exists, the claimant is the beneficiary of the examiner's initiative.

Appellant also contends that an aerial infrared photograph showing the area of his claims is positive proof of a mineral discovery. There is nothing in the record to support this contention. Although the photograph was introduced as evidence (Exh. Y) there was no expert testimony to interpret it. As appellant himself testified, he could obtain no precise data as to what the photograph showed (Tr. 129-130).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier  
Administrative Judge

We concur:

Bruce R. Harris  
Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

